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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1202

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130, PETITIONER

v

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130

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This dispute involves Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO Local No. 130 (hereinafter referred to as Local Union No. 130) and Turner, an employee of Perfection Painting and Dry Wall, Inc, (hereinafter referred to as Perfection), a New Mexico corporation having a contract with Brotherhood of Painters, Decorators and Paperhangers of America, Local Union No. 823 (hereinafter referred to as Local No. 823). Both subordinate local unions are members of International Brotherhood of Painters and

Allied Trades.

The Constitution of the International Brotherhood of Painters and Allied Trades requires every subordinate local union have a clause in their collective bargaining contract that:

> when a contractor or other employer does any work outside of his home city or town, not less than 75% of the men employed on such work shall be residents of or employed the greater percentage of their time in such locality; any others shall be employed only from the contractor's home locality

Perfection was signatory to such a contract with Local Union No. 823. Local Union No. 130, of course, had such a clause in its contract. Local Union No. 130 had no alternative but to enforce the contract and to comply with the Constitution of its International. This clause is clearly non discriminatory as to race, color, creed, sex, national origin, membership or non-membership in any union. Texas is a right to work state.

By contract, Local Union No. 130 is required to dispatch to the contractor, in the order the applicant signs the out of work list, any man or woman, union member or non union member, and the contractor has the right to accept or reject. Local Union No. 130 processes grievances for non union members as well as union members.

This contract provision was not introduced into evidence at the unfair labor practice hearing. Its admission has been urged by Local Union No. 130 at the Board level, repeatedly, and again before the Court of Appeals. (Appendix 41; 42; 50)

No action against Local Union No. 130 was taken from April 3, 1968, when the Board affirmed the Trial Examiner's finding of an unfair labor practice, until May 1970, when a backpay specification hearing was set. Accordingly, Local Union No. 130 was not forewarned or alerted to the necessity of further defending its position. The error, negligence and inadvertence of counsel in not introducing this contract provision was not transferred or referrable to the union. Local Union No. 130 had clean hands as it was adhering to the contract and observing the requirements of its International's Constitution. True, more than a year had elapsed under Rule 60(b) of Federal Rules of Civil Procedure. But this Rule also acts to mitigate the harsh impact of the calendar as a result of counsel's neglect and other circuits have held it is available in order to accomplish justice (Link v Wabash Railroad Company 370 U.S. 626,632, 82 S. Ct. 1386, 8 L.Ed.2 2734 (1962); L. P. Stewart Inc v Joseph H. Matthews 329 F.2d 234, March 9, 1964 C.A. District of Columbia)

A series of Motions were then filed with the Board. The first two were filed May 18, 1970, setting out the contract and reciting the 75% requirement and the grievance procedure with compulsory arbitration in case of disputes. These two Motions to the Board were NEVER answered. The Regional Director did answer a request for a stay of the backpay specification hearing in the prayer, by denying the stay (Appendix 49) The Regional Director, of course, had no jurisdiction to answer the prayer to reopen the record or for reconsideration.

Then on May 20, 1970, Local Union No. 130 filed an additional Motion to Stay Backpay Specification Hearing pending filing of briefs and Ruling on Motion to Reopen Record and Motion for Summary Judgment and Reconsideration (Appendix 50). No answer was received from the Board at hearing time on May 26, 1970 and Local Union No. 130 demanded that the Trial Examiner obtain answer from the Board, whereupon a telegram was dispatched saying Motion denied as "lacking merit" (Appendix 53) It is rare that a Court of law or equity denies a petitioner the right to file a brief and set out position, but the Board would not even permit this.

Then on July 28, 1970, Local Union No. 130 again filed a Motion to Reopen Record and take Testimony and/or Depositions, setting out the newly discovered evidence in the affidavit taken from Paul Robertson by a Board agent, alleging fraud on the Board. This motion was referred to and denied in the Board decision of November 19, 1970, BY FOOTNOTE, when it issued its supplemental decision and order affirming the Trial Examiner's decision. (Appendix 54; 76)

Paul Robertson was superintendent for Perfection and a star witness for the Board at the unfair labor practice hearing. On December 29, 1969, he made the following affidavit before the Board:

> . . . . I have not been induced to make this affidavit by Painters Local 130 or anyone else. I have offered to provide this information to the National Labor Relations Board because I have learned from my nephew, Malone, since the trial involving these people, that Malone and Turner had been carrying a grudge against the Painters Union because of some difficulties with Painters Local 823 in Albuquerque, and that they had gone to El Paso and tried to pull a deal with Local 902 there, using the same plan that they pulled here in Houston, but when they learned that the local out there did not have any money, they came to Houston with the deliberate intention of setting up the same deal here with Painters Union 130 here in

> Houston. This is something that I learned from my nephew since the trial. He told me this with his own mouth. I considered such conduct so outrageous that I decided to have nothing further to do with them and I wish now to provide this information to the National Labor Relations Board. I am perfectly willing to talk to any agent of the NLRB about this, or to testify.

When this came to the attention of Local Union No. 130, Motion was made to the Board to have this evidence in the record and adduce testimony thereon. Relief was again sought from the Court of Appeals. Robertson's statement shows an unconsciounable plan and scheme on the part of Turner, the Malone to provoke an incident with Local Union No. 130 in order to recover money damages. Both Turner and Malone knew the 75% resident requirement before they came to Houston; they were Albuquerque residents.

The Board flagrantly failed and refused to follow the Administrative Procedure Act 5 U.S.C.A. #555(e). This Court and other circuits have permitted, under Rule 60(b) of Federal Rules of Civil Procedure, the adducing of additional evidence under these circumstances where the result would be changed in the

light thereof. (N.L.R.B. v Fant Milling 360 U.S. 301 79 S.Ct.1179, 3 L.Ed. 1243, 1959; Hazel-Atlas Glass Company v Hartford Empire Company 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed. 1250; John O. England v Morgan J. Doyle 281 F.2d 304 U.C.A (9) 8/11/60; Raymond Rahauer v Leopold Friedman 306 F.2d 933 U.C.A (9) 7/25/62

Although the Solicitor General represents to this Court otherwise, Local Union No. 130 requested of the Court of Appeals the opportunity to introduce the contract and the 75% rule required by the International of all its subordinate locals, as well as Robertson's affidavit, alleging fraud on the Board and to adduce testimony thereon. Turner and Malone worked on the job at all times, but there were never a sufficient number of resident painters to justify the employment of Turner and/or Malone under the 75% requirement.

In the backpay specification hearing the union was not permitted to submit any evidence or adduce any testimony relevant to the unfair labor practice, the trial examiner limiting evidence to that having DIRECT REFERENCE to the "discriminatee's interim earnings or the sum he may or may not be entitled to in terms of the backpay specification" (Transcript 80).

Other circuits have permitted the introduction of additional evidence, including contracts and subsequently adduced evidence, for evaluation and appraisal of behavior, acts and conduct for a full and complete record before a reviewing court determines whether or not there is substantial evidence in the record as a whole to support an unfair labor practice finding.

It is beyond the comprehension of this Petitioner that its rights of due process will be foreclosed by this Court without a full record before it, in an equitable proceeding.

The Petition for a writ of certiorari should be affirmed.

Respectfully submitted,

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